UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Service Oil, Inc.,	**)**	**Docket No. CWA-08-2005-0010**
	)	
Respondent.	**)**	

ORDER ON RESPONDENT'S MOTIONS TO DISMISS AND MOTION FOR ADDITIONAL DISCOVERY

The Complaint in this matter alleges, in Count 1, that Respondent violated the Clean Water Act (CWA) and its implementing regulations, by failing to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NPDES) permit authorizing storm water discharges from its facility, and further alleges in Count 2, that after it obtained the permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or maintain inspection records on-site. The penalty proposed in the Complaint for the two alleged violations is $80,000. A Prehearing Order in the case was issued on July 19, 2005 requiring each party to file information and proposed exhibits in preparation for hearing. On December 14, 2005, Respondent submitted two Motions to Dismiss with prejudice, one on the basis that Complainant failed to comply with the Prehearing Order and the other on the basis that Complainant failed to disclose the calculation of the proposed penalty. On the same date, Respondent submitted a Motion for Additional Discovery, requesting discovery of information as to the proposed penalty. Complainant filed responses in opposition to the three Motions on December 27, 2005, which were received in the undersigned's office on January 10, 2006. Respondent submitted a Reply, dated January 10, 2006, to Complainant's Opposition to the Motion for Additional Discovery.

I. Motion to Dismiss for Failure to Comply with Prehearing Order

In its Motion to Dismiss for failure to comply with the Prehearing Order, Respondent points out that the Prehearing Order required Complainant to submit a copy of general NPDES Permit no. NDR03-0000 ("Permit 0000"), and a copy of the North Dakota Storm Water General Permit #NDR03-0571 ("Permit 0571"), or a statement that Permit 0000 is intended to reference Permit 0571. Respondent points out that Complainant's Prehearing Exchange states that a copy of Permit 0000 is designated as Complainant's Exhibits 6 and 7, and that Permit 0571 is designated as Complainant's Exhibits 4, 6 and 7. Respondent asserts that Exhibit 4 is a letter

giving notice of coverage under Permit 0571, that Exhibit 6 is a copy of a permit with a modification date of March 10, 2003, and that Exhibit 7 is merely a "Fact Sheet" dated September 3, 2004, none of which could have been the permit issued to Respondent on November 15, 2002. Respondent requests entry of an order dismissing the Complaint for such failure to comply with the Prehearing Order, or in the alternative, such failure should be considered as "such other matters as justice may require" in this proceeding.

In its Response, Complainant asserts that its Prehearing Exchange Exhibit 6 is Permit 0000, effective October 1, 1999, modified March 10, 2003, expiration September 30, 2004, and that it inadvertently omitted the initial version of Respondent's permit which was effective from October 1, 1999 through September 30, 2004. However, Complainant points out that Respondent submitted the version of Permit 0000 that was in effect when Respondent was granted storm water coverage on November 15, 2002, as Respondent's Prehearing Exchange Exhibit 15. Complainant explains that its Exhibit 6 superseded Respondent's Exhibit 15, and covered Respondent's construction activities in this case for sixteen months, from March 10, 2003 until June 30, 2004. Complainant asserts that the monitoring and/or reporting requirement for site inspections is identical in both permits, and that the only difference in language that could be applicable to this case, between the modified permit and the initial permit, is the allowance for construction sites less than five acres to perform site inspections every 14 days rather than every 7 days. Complainant asserts that Respondent's site does not meet that definition. Complainant argues that its inadvertent omission of the initial version of the permit should not result in dismissal because Respondent was not prejudiced in any manner. Moreover, consistent with 40 C.F.R. § 22.19(f), allowing parties to supplement prehearing exchanges when the party learns that the information is incomplete, Complainant submitted in its Rebuttal Prehearing Exchange as Exhibit 25 a copy of Permit 0000, effective October 1, 1999, six months before the date set for the hearing in this proceeding. Complainant also submits a procedural argument that Respondent's motion was filed after the deadline set for dispositive motions in this case.

Even aside from this procedural argument, Respondent's Motion to Dismiss has no merit. Respondent has not met the criteria in the Rule for dismissal, 40 C.F.R. § 22.20, the "failure to establish a prima facie case or other grounds which show no right to relief." Respondent has not argued or demonstrated that the failure of Complainant to submit a copy of the original Permit 0000 in the initial Prehearing Exchange shows that Complainant has "no right to relief" requested in the Complaint. The Rule governing failure to exchange information, 40 C.F.R. § 22.19(g), provides that "Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party . . . ; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c)." This range of sanctions suggests that the Presiding Officer assesses, in his or her discretion, the severity of the sanction relative to the extent and circumstances of nonfeasance. Given the facts and circumstances as to Complainant's failure to submit the original version of the permit, where Respondent submitted it in its Prehearing Exchange and Complainant submitted it in the Rebuttal Prehearing Exchange, the sanctions of drawing an adverse inference or excluding the permit from evidence would be unreasonable.

Ergo, dismissal of the Complaint would be extremely unreasonable and arbitrary.

As to Respondent's argument in the alternative, that Complainant's failure to include a copy of Permit 0000 in its Prehearing Exchange should be considered as "such other matters as justice may require," the latter is a factor listed in the CWA Section 309(g)(3) for the assessment of a penalty, and therefore is premature to decide at this time.

II. Motion to Dismiss for Failure to Disclose Penalty Calculation

Respondent also moves to dismiss the Complaint with prejudice on the basis that Complainant did not comply with 40 C.F.R. § 22.19(a)(3), which requires Complainant to "explain in its prehearing information how the proposed penalty was calculated in accordance with any criteria set forth in the Act." Respondent asserts that Complainant's Prehearing Exchange Exhibit 23 simply discusses in narrative form the six penalty factors set forth in the CWA § 309(g) and discloses the calculation of only one factor, the economic benefit of noncompliance, as $2,702.19. Respondent argues that Complainant assesses a total penalty of $80,000 without any calculation. Respondent requests as alternatives to dismissal that the penalty amount be limited to $2,702.19, or that Complainant's failure to include the penalty calculation be considered as "such other matters as justice may require" at the hearing in this matter, pursuant to CWA § 309(g) .

In its Response to this motion to dismiss, Complainant asserts that the undersigned has already ruled, on November 9, 2005, on the same issues as those raised in these Motions, and that the Motion to Dismiss is a dispositive motion which was not filed timely. Complainant asserts further that, as explained in its Prehearing Exchange, a penalty calculation worksheet was not prepared in this matter, and the EPA has never issued a penalty policy under the CWA for use by Presiding Officers in assessing penalties. The November 9th Order found that in the circumstances of this case, Complainant's Exhibits 20 and 23, namely the CWA Settlement Penalty Policy and Complainant's narrative "Penalty Justification," satisfy the requirements of the Prehearing Order. Complainant argues that the proposed penalty was based on the factors set out in the CWA § 309(g)(3) and the evidence supporting the alleged violations, and using the CWA Settlement Penalty Policy as guidance, and that the Presiding Judge must determine the penalty amount.

The request in the Prehearing Order to supply a penalty calculation worksheet detailing exactly how the proposed penalty was calculated is based on, and is substantially similar to, the requirement of 40 C.F.R. § 22.19(a)(3) to "explain . . . how the proposed penalty was calculated in accordance with any criteria in the Act." Therefore, November 9, 2005 ruling on Respondent's motion for dismissal based on an alleged failure for Complainant to comply with the request in the Prehearing Order applies to the present Motion based on the alleged failure to comply with 40 C.F.R. § 22.19(a)(3). Complainant's Exhibits 20 and 23 satisfy the requirement of 40 C.F.R. § 22.19(a)(3) in the circumstances of this case.

As to Respondent's argument in the alternative, that Complainant's failure to provide a calculation of the penalty in its Prehearing Exchange should be considered as "such other matters as justice may require," the latter is a factor listed in the CWA Section 309(g)(3) for the assessment of a penalty, and therefore, as concluded above, is premature to decide at this time.

III. Motion for Additional Discovery

A. Arguments of the parties

Respondent also moves, pursuant to 40 C.F.R. § 22.19(e), for additional discovery of all information considered and/or relied upon by Complainant in calculating the proposed penalty, answers to three interrogatories regarding the penalty calculation, and depositions of persons involved in the calculation of the proposed penalty. Respondent asserts that Complainant has "steadfastly refused to provide information to Respondent . . . detailing exactly how the proposed penalty was calculated," as requested in the Prehearing Order. Motion for Additional Discovery at 2. Respondent suspects that the proposed penalty was "simply pulled out of thin air." *Id.* at 3. Respondent notes that Complainant's Response, dated October 26, 2005, to Respondent's October 12, 2005 Motion for Dismissal for failure to submit a penalty calculation worksheet, purported to shield any penalty calculation documents and information on the basis that it was prepared for settlement purposes, but Respondent argues that the $80,000 proposed penalty was not for settlement purposes.

In its Opposition, Complainant argues that Respondent has not met the criteria of 40 C.F.R. § 22.19(e), on the grounds that the discovery requested is unduly burdensome, time consuming and unreasonable, because the information is either privileged or available at the hearing; that Respondent did not demonstrate that Complainant is unwilling to provide non-privileged information upon request; and that Respondent did not state what information is necessary and relevant to the penalty. As to depositions, Complainant argues that Respondent will be able to question witnesses at the hearing, and therefore has no basis to allege that relevant and probative evidence may not be preserved for presentation by a witness at the hearing. Complainant asserts that any penalty calculations it prepared would have been calculated for purposes of settlement under the CWA Settlement Penalty Policy, and the Rules of Practice provide, at 40 C.F.R. § 22.19(e)(2) that "Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable."

In its Reply, Respondent argues that it would be prejudiced if Complainant merely produces the requested information at the hearing. Respondent asserts that the $80,000 proposed penalty will be used as the "benchmark penalty," consistent with the Rule in 40 C.F.R. § 22.27(b), "If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." Respondent argues that it must show that the calculation of $80,000 was not appropriately based on factors that are applicable, and without

more information from Complainant, Respondent does not know which documents or witnesses would be relevant to a defense, and cannot expose the flaws in the calculation. Therefore, Respondent asserts, it is severely limited in its ability to formulate a defense as to the penalty and subject to "trial by ambush."

Respondent points out that the CWA Settlement Penalty Policy provides that "the development of the penalty amount to plead in an administrative . . . complaint is developed independently of this Policy . . . ." Respondent argues that, pursuant to that provision, if the $80,000 proposed penalty was calculated under the CWA Settlement Penalty Policy, it should be stricken from the Complaint. Further, Respondent argues that if, on the other hand, the proposed penalty was developed independently of the CWA Settlement Penalty Policy, then the documents requested should be easy to assemble and would not cause any delay.

Respondent argues that Complainant has named a witness to testify about the penalty calculation, but without a deposition, Respondent will not know anything about the penalty calculation until the hearing. If other persons were involved in the penalty calculation, they would have relevant information and should also be deposed. Respondent suggests that any privileged information should be disclosed in a privilege log. Respondent argues that Complainant does not have absolute discretion in determining a proposed penalty, and cites to a discussion in *C.W. Smith, Grady Smith & Smith's Lake Corp.*, 2004 EPA ALJ LEXIS 128 (ALJ, Initial Decision, July 15, 2004) of penalty calculation methodologies used by courts and Administrative Law Judges. Respondent argues that the reference in that discussion to "highly discretionary calculations" refers to those made by the ALJ, not those made by Complainant. Respondent asserts that if Complainant used one of the methodologies referenced in that discussion, Respondent needs to know which one, and if Complainant did determine the penalty under "absolute discretion," by simply pulling it out of thin air, Respondent needs to know that prior to the hearing.

B. Discussion and conclusion

Under the Rules of Practice, "other discovery" may be ordered if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). As to the first criterion, the Complainant's assertion that information is either privileged or will be available at the hearing does not establish that it will unreasonably delay the proceeding or unreasonably burden the Complainant. As to the second criterion, Respondent asserted that Complainant has "steadfastly refused" to provide information as to how

the proposed penalty was calculated, Complainant was requested in the Prehearing Order (at 3) to provide "a copy any 'penalty policy' relied upon" and "a copy of all other documents used in consideration of the proposed penalty in this case," and Complainant has not indicated that it is willing to provide any information other than that included in its Prehearing Exchange.

As to the third criterion, Respondent stated in its Motion for Discovery that it seeks documents considered and/or relied upon by Complainant in the calculation of the proposed penalty, all worksheets and penalty calculation worksheets prepared and/or utilized in such calculation, and EPA's proposed penalty policy for use in cases involving violations of storm water discharge permit requirements; and seeks answers to interrogatories to identify such documents, and to identify all persons involved in calculating and/or arriving at the proposed penalty, and depositions of such persons. These requests indeed state the information sought that is necessary and relevant to the penalty, which is contested. The question is whether the discovery sought would have "significant probative value on a disputed issue of material fact."

Complainant's Exhibit 23, the "Penalty Justification," is a narrative of alleged facts that Complainant considered as to the penalty. It does not include any calculations of the penalty, or any other indication of the allocation of dollar amounts representing the penalty factors, except for the economic benefit component. As stated by the Environmental Appeals Board (EAB), the CWA "does not prescribe a precise formula by which these [statutory] penalty factors must be computed nor does it provide any guidance regarding the relative weight to be given to any of them." However, as quoted by the EAB's predecessor, the Chief Judicial Officer, from an Administrative Law Judge's (ALJ's) order compelling EPA to provide information as to the proposed penalty calculation under the CWA, the respondent "is entitled to know precisely how the Agency calculated the penalty requested," and that the Agency must provide this information "so the respondent can review such information and see whether or not the Agency's calculations were based on erroneous or improper data or assumptions." *City of Kalamazoo Water Reclamation Plant*, 3 E.A.D. 109, 111 (CJO, 1990) (quoting ALJ order in *City of Kalamazoo Water Reclamation Plant*, dated March 20, 1989). In another case, an ALJ compelled EPA to produce information as to a CWA proposed penalty calculation where the EPA had provided a memorandum discussing facts relevant to the penalty, but there was "no discernable connection between this discussion and the ultimate penalty determination" by EPA, and it did "not enlighten the reader as to how the penalty was determined with respect to each violation and the relevant penalty factors." *Gallagher & Henry Countryside*, EPA Docket No. CWA-A-O-012-93, 1995 EPA ALJ LEXIS 10 * 20-22 (ALJ, Rulings on Motions to Compel and for Reconsideration and Order Setting Proceedings for Hearing, September 29, 1995). Any errors in the underlying data or calculation of the proposed penalty may be disputed issues of fact material to the penalty. Therefore, at least some of the discovery sought by Respondent has met the requirements of 40 C.F.R. § 22.19(e)(1).

Complainant asserts that "Any penalty calculations that may have been prepared by Complainant would have been done for the purpose of settlement," and that the Rules provide at 40 C.F.R. § 22.19(a)(2) that "'settlement positions and information regarding their development (such as penalty calculations for the purposes of settlement based upon Agency settlement

policies) shall not be discoverable.'" Opposition at 5. However, Complainant cannot refuse to provide *any* information as to the calculation of the penalty proposed *in the Complaint* on the basis that it was allegedly produced for settlement purposes. *See, Stanchem, Inc.*, EPA Docket No. CWA-2-I-95-1040, 1998 EPA ALJ LEXIS 11 * 18-20 (ALJ, Order on Motions to Compel and for Discovery, Feb. 13, 1998).

Some of the discovery sought, however, cannot be compelled. Complainant was requested in the Prehearing Order (at 3) to produce a "Penalty Calculation Worksheet." Complainant responded that a Penalty Calculation Worksheet was not prepared in this matter. Complainant's Initial Prehearing Exchange at 12. Complainant cannot be compelled to produce a document that does not exist.

Accordingly, Complainant shall be compelled to identify and produce "any and all documents and things considered and/or relied upon by Complainant in the calculation of Complainant's proposed penalty," produce EPA's proposed Penalty Policy for use in cases involving violations of storm water discharge permit requirements under the NPDES program, identify all work papers utilized and/or relied upon by Complainant in arriving at the proposed penalty, and identify all persons involved in calculating and/or arriving at the proposed penalty.

The request for depositions is premature at this point in time. Upon Complainant's compliance with this request for production and interrogatories, the information sought by deposition may be satisfied, or if not, then Respondent may be able to submit specific interrogatories to the person or persons involved in calculating the penalty. Thus the request for depositions would not meet the criterion of 40 C.F.R. § 22.19(e)(3)(i), as the information sought could be obtained by alternative methods of discovery . Moreover, the persons Respondent seeks to depose are not known at this time, except for the one penalty witness named by Complainant.

IV. Order

1. Respondent's Motion to Dismiss for failure to comply with the Prehearing Order is **DENIED.**

2. Respondent's Motion to Dismiss for failure to disclose the penalty calculation are **DENIED.**

3. Respondent's Motion for Additional Discovery is **GRANTED in part and DENIED in part.** Complainant shall submit to Respondent, within **fifteen days of service of this Order**, the following:

   A. A statement identifying, and a copy of, any and all documents and things considered and/or relied upon by Complainant in the calculation of Complainant's proposed penalty, in accordance with the applicable instructions and definitions in

Respondent's Request for Production of Documents and Things to Complainant and Interrogatories to Complainant;

B. A copy of EPA's proposed Penalty Policy for use in cases involving violations of storm water discharge permit requirements under the NPDES program;

C. A statement identifying all work papers utilized and/or relied upon by Complainant in arriving at the proposed penalty, in accordance with the applicable instructions and definitions in Respondent's Interrogatories to Complainant;

D. A statement identifying all persons involved in calculating and/or arriving at the proposed penalty, in accordance with the applicable instructions and definitions in Respondent's Interrogatories to Complainant.

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Susan L. Biro
Chief Administrative Law Judge

Dated: January 24, 2006
Washington, D.C.